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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1013

DAN W. SHAFFER, *Petitioner*

v.

JOSEPH E. SEAGRAM & SONS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on October 25, 1962.

CITATION TO OPINION BELOW

The United States District Court for the Western District of Oklahoma gave judgment in favor of petitioner, on a counterclaim to an action begun by respondent, without opinion. That court's findings of fact and conclusions of law are unreported but are in the record at pp. (10-16), and are reproduced herein in Appendix A. The opinion of the United States Court of Appeals, Tenth Circuit, is reported in 310 F. 2d 688 and printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1962. Appendix B. Rehearing was denied on December 10, 1962. Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. When Diversity cases constitute over fifty precent of the private civil litigation and over thirty-five percent of all litigation initiated in the Federal Courts, does the Supreme Court's artificial refusal to review an equal percentage of such cases, constitute such a misuse of the "sound judicial discretion" required by Rule 19 of the Court's rules as to result in effectively denying the individual litigant "equal protection of the laws" and "due process of law?"

2. In view of the fact that the Supreme Court has, since 1940, consistently refused to review Diversity cases invoking Rule 52 of the Federal Rules of Civil Procedure, and has, for ten years, been reluctant to review cases under the *Erie* Doctrine, has not the time come to review the injustices done to the individual litigant by this prolonged abstinence?

3. Whether the "use of sound judicial discretion" requires the Supreme Court to review diversity cases where there is an obvious and prolonged conflict between the District Court and the Court of Appeals?

4. Whether the use of "sound judicial discretion" will permit a great injustice to survive, by denying certiorari, where an individual litigant is brought into a Federal Court and his rights are violated by a Court of Appeals' failure to adhere to Rule 52(a) of the

FRCP and its denial of recovery, rightfully granted under applicable state law?

5. Whether the power of supervision over Federal Courts requires the Supreme Court to correct the error of the Tenth Circuit in ignoring the District Court's findings of fact and substituting their own in clear violation of Rule 52(a), thereby failing to follow the applicable State law and the general law?

6. Whether the Supreme Court should exercise its power of supervision over Federal Courts where a Judicial Method of avoiding the long established doctrine of *Erie R. Co.* v. *Tompkins* has been clearly ascertained?

7. When the Supreme Court has determined the manner in which Rule 52 of the Federal Rules of Civil Procedure is to be applied, as it did in *United States* v. *Yellow Cab Co.*, should this Court exercise its supervisory power by hearing a fair percentage of diversity cases involving Rule 52 to enforce this mandate so that its correct application by the lower federal courts will be assured?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues in the instant case necessarily involve Article III, Amendment V of the United States Constitution (see Appendix E, p. 24a), the Oklahoma Statute of Frauds, 15 Okla. Stat. Annot., § 136, subsection 4 (see Appendix D, p. 23a), Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A. (see Appendix F, p. 25a). Also applicable to the issues herewith raised is Rule 19 of the Revised Rules of the Supreme Court of the United States (see Appendix G, p. 25a).

STATEMENT OF THE CASE

Involved in this petition are the petitioner, Dan W. Shaffer, a drilling superintendent, and respondent, Joseph E. Seagram & Sons, Inc., a subsidiary of a Canadian corporation controlled by the Bronfman family of Montreal, Canada. Joseph E. Seagram & Sons, Inc. is the successor corporation to Riceland Corporation, a Delaware Corporation. The jurisdiction of the District Court was invoked because of Diversity of Citizenship, petitioner being a citizen of Oklahoma and respondent corporation is a citizen of Indiana.

In March of 1954 the Bronfman Family owned about 99% of the outstanding common stock of the Riceland Corporation. This drilling company was then inactive, had no assets, and from its previous operations had what Respondent's President, Edgar Bronfman, described as an "overwhelming deficit," in the neighborhood of $200,000 to $300,000. Edgar Bronfman, as the authorized agent and representative of the Bronfman family, exercised complete management and control over the Riceland Corporation. Early in 1954, after deciding to reactivate Riceland Corporation, Edgar Bronfman asked M. R. Shaffer, who at that time was Vice President of Riceland Corporation, to find a suitable person to manage and revive the corporation. M. R. Shaffer talked to several people about the availability of trained individuals and decided to approach the Petitioner. At that time, Petitioner was employed as Assistant to the Drilling Superintendent for Parker Drilling Company, one of the largest drilling companies in the Southwest. He had been employed by that company for nine years. M. R. Shaffer telephoned Petitioner and proposed to employ him to operate the Rice-

land Corporation for a salary of $1,000.00 a month and a "substantial stock option." Petitioner accepted employmenet under these general terms.

On February 22, 1954, M. R. Shaffer sent a signed memorandum to Samuel and Allan Bronfman concerning Petitioner's employment, and further stated: "Dan Shaffer [Petitioner] should acquire, and I would like to "*improve*,"[1] common stock holdings in Riceland."

M. R. Shaffer at the trial testified, after Petitioner had accepted the general proposal of a "substantial" stock option, that he made a survey of other situations in order to determine what would be an equitable stock participation between the financiers and the operators of this type of business. M. R. Shaffer determined that a 30% stock option of the outstanding stock at $1.00 share to Petitioner was fair and equitable. In a "notegram" or memorandum to Edgar Bronfman, he recommended the 30% stock option. [This "Notegram" was not produced at the trial, since Respondent claimed it was not found in their files.] M. R. Shaffer further testified that Edgar Bronfman acted favorably upon the recommendation and directed M. R. Shaffer to so advise the Petitioner. (T.R. pp. 66, 70).

On May 7, 1954, about 21 days after Petitioner commenced work, he was advised by M. R. Shaffer of the 30% stock option and the Petitioner accepted. The Petitioner testified that under the oral agreement in May of 1954, he could have exercised the option the first year and that there was never anything discussed with him as to when he had to take it; accordingly, the option agreement was not, by its terms, to be exercised by Petitioner in more than a year.

[1] The Court of Appeals in their opinion erroneously indicate this word to be "approve." (See Trial Record, Exhibit 1, p. 131.)

On April 6, 1955, Edgar Bronfman, apparently most satisfied with Petitioner's services, wrote to Petitioner advising him that his salary had been increased to $17,000.00 per year and stating: "Common stock participations by yourself and Mr. Hicks are under advisement and, when the details have been examined, I should like to discuss the matter with you." (T.R., p. 132).

On June 2, 1955, E. A. Bratton, as Vice President and Treasurer of Riceland, wrote Petitioner as follows:

"Dear Dan:

Re: Shareholding Interests

"This will *confirm the shareholding participations* in the *outstanding* common stock of Riceland Corporation for yourself and Orville W. Hicks as follows:

Dan W. Shaffer	5%	4,242 shares
Orville W. Hicks	2%	1,696 shares
Other shareholders	93%	78,900 shares
	100%	84,838 shares

"The cost of the shares will be $1.00 a share, with terms of payment to be arranged.

"It is also understood that the 799 shares owned by Mr. M. R. Shaffer will form part of your common stock participation and that Mr. M. R. Shaffer will be reimbursed $799.00 representing his cost.

"A directors' meeting will be required to formally confirm your stock participation. I suggest, however, that this meeting be deferred for the time being." (T.R., p. 132).

Since this letter did not designate the full 30% stock option, Petitioner telephoned E. A. Bratton. Petitioner had also seen that this stock option appeared to be partly from unissued stock although it was stated

to be from "outstanding common stock." Bratton said he would "have to check with Edgar" and would then advise.

On June 6, 1955, Bratton wrote Petitioner as follows:

> "Dear Dan:
>
> "Attached is copy of letter to Ray [M. R. Shaffer] in connection with the purchase by you of his 799 shares of Riceland.
>
> ". . . There is one point, Dan—if you wish to defer purchase until you get your *full participation* or, for personal reasons you do not wish to take down the shares now, an alternative method would be *for Richland to redeem the shares* they would then be included in *your total participation when issued later.*
>
> "Whichever way you decide is satisfactory to the other directors, Dan, but you might let me know what you decide." (T.R., pp. 133-134).

Petitioner testified that in December 1955, he attended a "budget meeting" in New York, N. Y. He saw the written agenda that had been prepared by M. R. Shaffer, proposing that Petitioner's stock participation be consummated, but was asked by Edgar Bronfman to defer any discussion on the subject and "gave his word" that the participation would be worked out. (T.R., p. 103).

In the Fall of 1956, Edgar Bronfman then received a recommendation from one Carroll Bennett (who did not testify) that he discontinue drilling operations and so wrote the Petitioner, saying he did not "want to be placed in the position of having to pull the rug from under you, should we decide to liquidate the Corporation." This was November 1, 1956. The Cor-

portation, however, kept on drilling because they could not find a market for the drilling equipment.

On January 2, 1957, Petitioner, backed by financing from the First National Bank of Tulsa, made a written offer to acquire Riceland Corporation. As part of the consideration for the purchase, Petitioner wrote that he would "relinquish to present owners any considerations due them from stock participation plan or any other commitments due." No response ensued until January 21, 1957, when one Harry Mack, a person affiliated with Frankfort Oil Company (another subsidiary corporation owned by the Bronfmans), came to Petitioner and informed him that if he could not better his offer of purchase, he was there to "take over." The following morning Mack came again and asked if Petitioner could "better his offer" and Petitioner orally attempted to exercise his stock option. That afternoon, Petitioner was summarily removed as President of Riceland Corporation. Criticism of Petitioner was then expressed for the first time; the stated reason for discharge was "because of his lack of ability properly to perform the duties of such office."

On February 6 and 14, 1957, Petitioner sent two letters to Edgar Bronfman attempting to exercise his 30% stock option. Edgar Bronfman denied that Petitioner ever had a "stock option agreement."

Early in Petitioner's employment, specifically, December 1, 1954, the Riceland Corporation, advanced Petitioner $10,000.00 to buy a home, evidenced by a later promissory note dated September 26, 1956. On June 7, 1957, Riceland Corporation demanded payment of this note. Petitioner answered by again attempting to exercise his stock option, seeking either the stock

"or its equivalent cash value" and stating he was willing to let the unpaid balance of the note apply. This case was commenced by Respondent's action to recover the balance due on this note. The Petitioner counterclaimed for damages. It was determined at trial that the stock in question was valued at 79c per share on a June 30, 1955 valuation and the value had increased to $3.27 per share as of the time of the breach of contract by the Respondent.

DISPOSITION OF THE DISTRICT COURT

This case was tried without a jury in the United States District Court for the Western District of Oklahoma. After hearing all the evidence, Judge Chandler decided in favor of Defendant and awarded Defendant a judgment on his counterclaim in the amount of $57,771.50. He made findings of fact and conclusions of law in support of his judgment. (Appendix A)

THE DISPOSITION IN THE COURT OF APPEALS

The Respondent appealed from the District Court's judgment to the United States Court of Appeals for the Tenth Circuit. In an opinion by Judge Delmas C. Hill, of Wichita, Kansas, the Court of Appeals reversed the trial court and remanded with directions to enter judgment in favor of Respondent without any determination that essential findings of Judge Chandler's were "clearly erroneous." Petitioner sought a rehearing but this was denied. (Appendix C)

REASONS FOR GRANTING THE WRIT

This Petition should be granted in order to:

1. Protect and defend the Fifth Amendment rights of the individual litigant to "equal protection of the laws" and to "due process of law" in Federal cases arising from diversity of citizenship, especially since this Court in recent years has been reluctant to review diversity cases.

2. Re-instruct and supervise the Federal Courts, particularly the United States Courts of Appeal, on the proper meaning and application of the Judicial Dictrine of *Erie R. Co.* v. *Tompkins*, especially since this Court, by a reluctance to review cases involving its application, has permitted the lower Federal Courts to adopt a Judicial Method of avoiding that doctrine.

3. Re-instruct and supervise the United States Courts of Appeal on the proper meaning and application of Rule 52 of the Federal Rules of Civil Procedure, as determined by this Court in *United States* v. *Yellow Cab Co.*, and to enforce its correct application by those courts, especially since this Court has refused to review such applications in cases arising under diversity of citizenship.

ARGUMENT

POINT I

Under Article III of the United States Constitution This Court Has No Authority to Establish a Blanket Exclusionary Rule Under Which It Denies Certiorari in Practically Every Diversity Case Decided By the United States Courts of Appeal.

Point II of this Petition establishes that defendant Seagram's, a large corporation has "reneged" on its contract to reward Petitioner for his efforts in making a failing corporation financially successful.

This manifest injustice is a result of a decision of the Court of Appeals for the Tenth Circuit, which reversed an experienced Oklahoma District Judge and made new findings of fact in violation of Rule 52 of the Federal Rules of Civil Procedure.

Petitioner, a small individual, should have his civil rights protected by this Court from injustice as equally as the rights of individuals in criminal cases are presently protected.

This Court as created under Article III is the juridical head of this nation in *Diversity* as well as *Federal Question* cases.

Yet, since the decision in *Erie* v. *Tompkins*, 304 U.S. 64 (1938), this Court has been denying certiorari in almost all *Diversity* cases. In so doing, this Court does the greatest injustice to the litigants.

In confining itself to reviewing constitutional issues or points involving the interpretation of federal statutes, this Court fails to follow the constitutional mandate of the Fifth Amendments. Such mandate dictates that this Court review a proportionately greater number of *Diversity* cases under the present

practice. This Court almost always denies certiorari in a *Diversity* case.

The time has now come to brief and argue the wisdom and constitutional propriety of such a blanket exclusion of *Diversity* cases from review.

Not since 1940, has this Court reviewed a *Diversity* case in which error in the application of Rule 52 by a Court of Appeals was alleged.

Yet every year there are an increasing number of *Diversity* cases tried in federal courts. While in the fiscal year 1961-1962, *Diversity* cases constituted over 50% of all federal civil litigation and over 35% of all types of federal litigation, during the 1961 Term, the Supreme Court granted certiorari in *only* four *Diversity* cases.

To persist in leaving to the Circuits review of all such litigation is a national tradgedy. It means that this Court is denying its wisdom and guidance in supervising the work that most lawyers and courts are doing.

Here under *Erie* v. *Tompkins*, *supra*, the District Court and the Tenth Circuit were obligated to apply Oklahoma law.

In attaining a result in any litigation, there are two variables: the facts and the law. In federal courts, under the *Erie* Doctrine, the law (of the State) must be treated as a constant, i.e. the Federal Judge cannot change the state's interpretation of it; he can only decide on its application to the facts before him. Consequently, the only way that the result may be varied is for the facts, as the sole remaining variable, to be altered.

Under Rule 52 of the Federal Rules of Civil Procedure, it is the function of the District Court sitting without a jury to find the facts, and these "[f]indings of fact shall not be set aside *unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." [Emphasis added].

When, after an extensive hearing of the evidence, certain express findings of fact are made by the District Court, the Court of Appeals ought not be permitted to change the result of the case by altering the District Court's findings of fact and substituting their own. This clearly violates the *spirit* of the *Erie* Doctrine and should only be permitted when Rule 52 is *strictly* adhered to.

In the instant case, the Tenth Circuit Court of Appeals was clearly *in error* in violating Rule 52 by completely disregarding the *essential* findings of fact by the District Court. Thus, in order to remain within the limits of the *letter* of the *Erie* Doctrine, by applying Oklahoma law to a given set of facts, and to arrive at the result they desired, the Tenth Circuit Court of Appeals altered the facts in violation of Rule 52. While keeping strictly within the *letter* of *Erie* decision, they grossly violated the *spirit* of that decision. Such a judicial method of avoiding this Court's clear mandate must not be permitted.

The importance of supervising this procedural mandate lies not only in its consequences, but even more so in the fact that it is a law which was promulgated under the judicial power of this Court.

Normally a law enacted by a legislature is continually subject to close scrutiny and re-evaluation by sub-

sequent sessions of that legislature. It is re-interpreted and modified at frequent periodic intervals to insure that it will remain applicable to the needs of a rapidly changing modern society. One of the most important qualities of a good law (be it either a statute enacted by a legislature or a decision rendered by a court)—or, for that matter, a good legal system—is flexibility. In order to insure that what is presently a good law will remain so in the future, its flexibility must be preserved by providing for its constant scrutiny by its formulators.

For a good law to be effective, it must be correctly applied. What may be a good law in theory or on paper may become a bad or undesirable law where its application does not conform to the intent of its formulators. Such faulty or incorrect application is usually due to a misunderstanding of the law's purpose by the courts charged with administering it. In order to provide that such a law will be correctly applied, supervision of its application by its formulators is necessary. Such supervision by a legislature is exercised by its power to repeal or modify the law in order to clarify that law's purpose and application.

Such supervision by a court is exercised in its powers of interpretation and supervision of inferior courts to clarify that law and to instruct the inferior courts on its purpose and application. Inaction by the formulators leads to confusion rather than clarity.

However, judicial supervision must not solely be limited to ruling on the application and purpose of a law. The Court must exercise its supervisory power to enforce its ruling and to guarantee the correct application of that law. Constant supervision is absolutely essential to the protection of good law.

Since the start of the October 1953 Term, the *Erie* Doctrine has been examined in *only* 13 cases. In chronological order of interpretation, they are: a.) non-diversity: *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 408 (1953), *Wilburn Boat Co.* v. *Fireman's Insurance Co.*, 348 U.S. 310 (1955), *Leiter Minerals, Inc.* v. *U. S.*, 352 U.S. 220 (1957), *Commissioner of Internal Revenue* v. *Stern*, 357 U.S. 39 (1958), and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959); b) diversity: *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), *Smith* v. *Sperling*, 354 U.S. 91 (1957), *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), *Dick* v. *N.Y. Life Insurance Co.*, 359 U.S. 437 (1959), *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959), *Nolan* v. *Transocean Air Lines*, 365 U.S. 293 (1961), and *The Glidden Co.* v. *Flanok*, 370 U.S. 530, (1962). Thus in 10 years, this Court has heard only 13 *Erie* cases, and only 7 of those cases arose under *Diversity*.

The last time that this Court has extensively examined the *Erie* case was five years ago in *Byrd* v. *Blue Ridge Rural Electric Cooperative*, *supra*. It is a most important dictate of "sound judicial discretion" which requires this Court, particularly in the light of recent judicial history, to once again consider the *Erie* Doctrine and either re-affirm, modify or overrule it.

As previously stated, this Court has not reviewed the application of Rule 52 by a Circuit in a *Diversity* case since 1940.

The time has come when the Court should consider whether a blanket rule under which it refuses to review most *Diversity* cases is resulting in manifest injustice.

This is particularly true when, as here, the Court of Appeals reverses a District Court on findings of fact, permitting a large corporation to "renege" on its bargain with a small individual.

"The Judiciary Act of 1789 . . . established a system of federal trial courts throughout the United States and vested them with jurisdiction of controversies 'by a citizen of the state in which the suit is brought against a citizen of another state.'" [Justice Robt. H. Jackson, *The Supreme Court as a Law Court*, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 33 (1955).]

Article III, section 2 of the Constitution of the United States specifically provided that "[i]n all other Cases before mentioned [which include *Diversity* cases], the Supreme Court shall have *appellate jurisdiction*, both as to *Law* and *Fact* . . . ." [Emphasis added]. Congress, utilizing its power to make "exceptions" and "regulations" of the Supreme Court's jurisdiction, has implemented Article III, Section 2, by providing that *Diversity* cases may be reviewed by this Court on writ of certiorari, 28 U.S.C. 1254(1).

While this Court has determined in Supreme Court Rule 19 that such review "is not a matter of right" on the part of the litigant, this Court has imposed upon itself the *duty* of using "sound judicial discretion" in exercising its *right* to review such cases.

Both the Original Colonies which adopted the Constitution and the Congress which enacted 28 U.S.C. 1254(1) expressly granted this Court jurisdiction in reviewing *Diversity* cases. Nowhere in either the Constitution or the laws enacted by Congress is there any implication that such power to review is not or should

not be exercised in a given area. By implication, this Court has the power to refuse to review cases, but such *refusal* must be tempered with *sound judicial discretion*. Arbitrariness is the antithesis of discretion.

This Court in exercising its jurisdiction in certain cases, while based on a desire to utilize this Court's time to its best advantage and to reduce the volume of cases which this Court will review in order to make a more adequate adjudication of the cases which it actually does decide, has in recent years been quite reluctant to review any case, regardless of its merits, in certain "fields" of the law.

One of these areas is pointed out by the late Justice Robert H. Jackson: "A litigant's chance to reach the Supreme Court on the question of whether state law is misapplied, though promised by the Court's rules, is zero." (Jackson, *op. cit. supra*, at 37). This is reaffirmed by Mr. Justice Brennan in *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, reported in 80 S. Ct. 16 (1959), where he points out that ordinarily an application by a District Court of the Rules of Civil Procedure, which is affirmed by a Court of Appeals will not be reviewed by this Court.

However, in the instant case the error in refusing to apply Rule 52 was made by the Court of Appeals *alone*, and most importantly that refusal resulted in completely disregarding "the judgment of the District Judge in relation to a particular set of facts" (80 S. Ct. at 18).

The result of arbitrarily circumscribing certain areas of the law and refusing review of the cases which fall within those areas, is to formulate an "exclusionary rule" which prevents the lowly litigant from redressing the injury to him by the error of law or fact com-

mitted by a lower federal court. Thus, whether a litigant's final plea for justice in his case is to be reviewed by this Court depends more on the fact that a federal statute is involved than on the merits of the petitioner's case. Such method of review, regardless of the soundness of the reasons therefore, appears to be arbitrary.

While the granting of the writ of certiorari "is not a matter of right," the arbitrary refusal to grant the writ would seem to be a violation of the litigant's right to an "equal protection of the laws" as encompased by the "due process" clause of the Fifth Amendment. At least, if not such a violation of a litigant's right, then it is a neglect of "sound judicial discretion" in the granting of certiorari and of the *duty* which is imposed on this Court by Rule 19 of its own Rules and by Article III of the Constitution.

This can best be summed up by referring to the words of the Honorable Thurman Arnold, in which he defended this Court's reviewing of a case which involved a determination of fact. While his words are in reference to jury verdicts under the Federal Employers Liability Act, and in particular to the case of *Rodgers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), they have a much broader meaning and envelop the entire scope of judicial review. (*Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960) at 1301-1302).

> "I had not thought that the discretionary power to refuse certiorari permitted the Supreme Court to abandon any area of its jurisdiction and refuse to look at particular cases not on the merits but on the theory that the whole area was forbidden by judicial fiat. . . .
>
> When, therefore, the Supreme Court reviews a . . . case in order to compel co rts of appeals to

> respect jury verdicts, the Justices are doing far more than merely deciding an isolated evidentiary fact. They are laying down a principal vital to the security of lowly litigants. Access to the Supreme Court by the lowliest citizen . . . is tremendously significant. . . .
>
> To say that it is a waste of the Court's time to provide such precedents is to show a callous disregard of the rights of injured persons. If such cases are not to be reviewed it should be Congress and not the Court that should say so."

What Thurman Arnold said about the duty of this Court to review reversals by Courts of Appeal in F.E.L.A. and Jones Act cases applies equally to review here, where the Tenth Circuit in an opinion written by a Kansas Judge and lawyer reverses an experienced Oklahoma Judge and lawyer, not on the law or the facts but by finding new facts in violation of Rule 52.

Nor is this the first time the Tenth Circuit has done this (see *Frankfort Oil Co. v. Snakard*, 279 F. 2d 436 (1960), *cert. denied.*, a case involving this same defendant).

The time has come when this Court must speak on the proper application of Rule 52 by Courts of Appeals in *Diversity* cases.

POINT II

The Court of Appeals for the Tenth Circuit Clearly Violated Rule 52 of the Federal Rules of Civil Procedure as Interpreted By the United States Supreme Court in United States v. Yellow Cab Co., 338 U.S. 338, and Thereby Circumvented the Oklahoma Supreme Court Determination That Performance of Services in Consideration for an Oral Option to Buy Corporate Stock Is "Part Payment" and Is Not Within the Statute of Frauds.

Rule 52(a), Federal Rules of Civil Procedure, provides, in part, as follows:

"Findings of fact shall not be set aside unless *clearly erroneous* and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses."

The scope of appellate review under the mandate of Rule 52(a) is set out by *Mr. Justice Jackson* in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150; at 341, 342:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendant's witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt, and concluded that they bear a different meaning from that for which the Government contends."

> "It ought to be unnecessary to say Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this court for what virtually amounts to a trial de novo on the record of such findings as intent, motive, and design. While, of course, it would be our duty to correct clear error, even in findings

> of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

This doctrinal construction of Rule 52 of the Federal Rules of Civil Procedure has been followed in many cases both in the Supreme Court and the Circuit Court of Appeal. See, for example, *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007; *Cleo Syrup Corporation* v. *Coca-Cola Company*, 139 F. 2d 416 (8th Cir. 1943); *Nee* v. *Linwood Securities Company*, 174 F. 2d 434 (9th Cir. 1949). Petitioner contends that the Court of Appeals of the Tenth Circuit clearly violated this mandate of the Supreme Court by failing to recognize essential findings of fact by the trial court.

The existence of an oral agreement between the Petitioner and Respondent for a 30% stock option at $1.00 per share, is not at issue in this appeal. The Court of Appeals readily admits that such a contract existed. However, it held that such an agreement was unforceable within the Statute of Frauds.

The sole question in this case is one of fact, namely, was there an oral agreement that accepted services would be received as part payment for stock which became worth more than one dollar a share? In Finding of Fact #9 (Appendix A), the trial court found that the services rendered by the Petitioner were of such a unique and highly successful nature that they were the prime consideration for the stock option.

The right of the Trial Court to find as a matter of fact that services were of such a nature as to render them the prime consideration for the oral agreement, is in no way contested by the Court of Appeals.

Further, in an action to enforce a contract to bequeath personal property, as distinguished from real estate, an appellate court cannot say as a matter of law that the services rendered to and accepted by the Testatrix, mother of the plaintiff, were solely attributable to filial loyalty or concern for the mother; *Scott v. Grinell*, 102 N.H. 490, 161 A 2d 179, at 182-3. That question was one for the trier of the facts. The action was for breach of contract. The bar of the Statute of Frauds was removed by "payment."

In the case at bar the Court of Appeals made no determination as to this issue of fact but merely held that no such finding was made. After finding as a fact that such services were the primary consideration for the stock option, the trial court applied the proper Oklahoma Law, which states that performance of services is considered "part payment" under the Statute of Frauds of the State of Oklahoma (15 O.S. 1961, § 136, sub-section 4). This exception to the bar to enforceability is well established in Oklahoma Law. In *Hays Drilling Co. v. Sartain*, 108 Okla. 181, 235 Pac. 615, the Supreme Court of Oklahoma held as follows at 616:

> "The performance by the Plaintiff was in the nature of services fully rendered and benefits fully received by defendant, rather than money paid. We think the position of the plaintiff is, as a matter of law, the same as if he had paid to the defendant so much money for the stock. . . ."

In 2 Corbin, *Contracts*, § 495, the author states that services that are the full equivalent of a salary *and* of a promise to sell an interest in a business should make the owner's oral promise enforceable, even though it was not expressed to be a part of the price of the interest. In Section 495 he approves *Hightower* v. *Ansley*, 126 Ga. 8, 54 S.E. 939, holding that the agreed price may consist of services instead of money or goods, and that rendition of the services constitutes payment. The *Hightower* case involved an action for damages for refusal to deliver corporate stock after plaintiff gave up a lucrative position and entered the service of the corporation at a fixed salary. Professor Williston is in accord; the statute puts no limit on the way that the price shall be paid; 2 Williston, *Contracts*, 2d Ed. § 565.

The Missouri Court cited and followed Corbin in *Osborn* v. *Chandeysson Electric Co.*, 248 S.W. 2d 657 (1952). The facts are remarkably similar to the case at bar. The Corporation and its stockholder were one and the same; it was completely dominated by him. The employee gave up a job and performed services held to be part payment for the agreement to transfer stock to him. When he went to work, it was agreed only that he would get a "substantial" amount of stock. Nineteen months later the amount orally was made definite. The employee's testimony about the oral contract was verified by his father. But the stockholder's denial of these statements was corroborated by two of his officers. The employee was discharged, then demanded his stock, and brought suit. The court held that the jury was justified in finding that although the initial agreement was too indefinite, it was later made clear and enforceable. The court on page 662 states:

"... The contract according to Plaintiff, was that he was to come to work for defendant and receive the same salary the Ralston Company was paying him and a substantial interest in defendant company. Plaintiff thereupon entered upon the performance of his obligation by giving up his position with the Ralston Company and working for defendant. Plaintiff's performance of services constituted a good consideration and was the payment agreed upon for the stock according to plaintiff. *Vogeler* v. *Punch*, 205 Mo. 558, 103 S.W. 1001, 1005; *Ostrander* v. *Messmer*, 315 Mo. 1165, 289 S.W. 609, 613. Under plaintiff's view of the evidence, it was a jury question whether there had been performance by plaintiff and a recognition by defendant of such performance as entitled plaintiff to the stock. *Lorenz* v. *Morney*, 221 Mo. App. 409, 282 S.W. 59, 61. The Statute does not preclude a recovery."

Based on the evidence presented at the trial and taking into consideration the foregoing authority on the subject, the trial court made the correct determination of fact.

It does not necessarily follow, as the Court of Appeals contends, that since the trial court found as a fact (Finding of Fact #4), that Petitioner did not have an enforceable option until the 30% became definite, that the services rendered were not the primary consideration for the stock option. When read in connection with other findings of fact, it is apparent that the trial court was merely saying that prior to the option becoming definite at 30%, the Petitioner had no enforceable contract. Regardless of whether or not the "30%" stock option existed on the day Petitioner commenced work, his services were rendered for salary plus a "substantial" stock option. Petitioner's dili-

gence and initiative resulted in the performance of highly successful and unique services, increasing the value of the stock in question from 79c to $3.27 per share.

In the case of *Buice* v. *Scruggs Equipment Co.*, 194 Tenn. 129, 250 S.W. 2d 44, which concerned an oral option to a corporation's vice president to buy stock, the court, when confronted with the objection that the Plaintiff's salary was payment in full for his services, stated as follows at 47, 48:

> "... It is argued that nothing has been done, no part performance, as to the transfer of the stock to the appellant by the appellees and that this—the transfer of the stock and giving the notes therefor—was and is the contract which is sought to be enforced. In our judgment reading the averments of the bill, and making a very thorough study of the contract as alleged, we think that the transfer of this stock and the giving of the notes therefor was only a part of the contract as a whole and that the principal reason for making the offer to thus transfer this stock to the appellant was not the giving of the notes and paying for the stock as alleged *but for the things that he did for the appellees to get this stock for that price.*"
>
> "... The acts of the appellant relied on as partial performance had been done by him in pursuance to the averred contract and agreement and are clearly referable thereto."

Therefore, the Trial Court was justified in finding that the *services* rendered were the prime consideration of the 30c stock option agreement regardless of whether or not it is to be treated as part of the initial employment contract.

POINT III

The Court of Appeals for the Tenth Circuit Failed to Comply With the Spirit of the Statute of Frauds as Determined By the Supreme Court of Oklahoma, in Permitting the Statute of Frauds to be Used as a Shield Against the Enforcement of a Valid Oral Contract.

As the Court of Appeals points out in citing *Wells* v. *Shriver*, 81 Okl. 108, 197 P. 460, the Oklahoma statute of Frauds "was enacted for the purpose of preventing fraud and not for the purpose of promoting frauds or aiding a person in the perpetration of frauds." In the *Wells* case, the Supreme Court rebuked an individual who was attempting to invoke the Statute of Frauds. The Oklahoma Court wanted to restrict the use of the Statute of Frauds, so as not to permit a person to use this as a shield to the enforcement of a contract. Petitioner is in agreement with the Court of Appeals, that since no allegation of fraud was made by the Petitioner, the trial court could not find fraud, *as such*, on the part of Edgar Bronfman.

However, the trial court, rather than finding fraud, *as such*, merely, wanted to emphasize the doctrine handed down by the Oklahoma Court in *Wells* v. *Shriver supra*. From the testimony, or rather the lack of testimony on behalf of the Respondent, the trial court was justified in concluding that the Respondent was using the Statute of Frauds as a means to bar the enforcement of a valid oral contract. The trial court realized that to hold otherwise would be a great injustice to a man who worked so diligently in order to change a failing corporation into a growing and prosperous one.

The Court of Appeals by reversing the judgment of the trial court has caused a great injustice. The only

wrong committed by Petitioner was his trust in the word of his employer. The vast majority of jurisdictions including the State of Oklahoma have come to realize that the strict enforcement of the Statute of Frauds will lead to unwarranted injustices. For this reason, many exceptions to the prohibitions of the Statute of Frauds have been created. Included in these exceptions are performance of services as part payment in an oral contract (*Hays Drilling Co.* v. *Sartain, supra*).

When the bulk of the evidence presented in the trial court involves the sworn testimony of witnesses, as it does in cases involving the Statute of Frauds, a great deal of weight must be given the trial court's determination of the witnesses credibility. The trial judge, himself, and he alone, hears the testimony on the witness stand. The Respondent did not attempt to present witnesses to refute the testimony of the Petitioner's witnesses but merely contends that the oral agreement is unenforceable under the Statute of Frauds. By this mere technicality, the Petitioner is being deprived of property which is rightfully his. The Court of Appeals, by their decision, sanctioned the conduct of Respondent. Such conduct being a highly unethical breach of the duty that an employer owes an employee.

CONCLUSION

1. The Court of Appeals of the Tenth Circuit clearly violated Rule 52 of the Federal Rules of Civil Procedure as interpreted by the U. S. Supreme Court.

2. The Court of Appeals of the Tenth Circuit failed to apply the proper Oklahoma Law to the findings of fact in the case.

3. The Court of Appeals of the Tenth Circuit failed to comply with the *spirit* of the Statute of Frauds as determined by the Supreme Court of Oklahoma.

4. The Supreme Court should grant certiorari because this is a *Diversity* case, in which the Court of Appeals not only violated Rule 52, but also violated the *spirit* of the Judicial Doctrine of *Eric R. Co.* v. *Tompkins.*

For these reasons, Petitioner respectfully prays that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Western District of Oklahoma

FINDINGS OF FACT

The Court, as trier of the facts, finds all facts and all issues generally in favor of cross-complainant under his amended first counterclaim, and finds all issues thereunder express or implied, in favor of defendant cross-complainant. In addition thereto, and in addition to the findings previously made by the Court from the bench, the Court further specifically finds:

1. The note sued upon was at all times held without the State of Oklahoma and the amount owed plaintiff thereon is $8,133.28.

2. There is diversity of citizenship between the parties and the amount in controversy exceeds the amount required for jurisdiction in this Court.

3. At all times, the Bronfman family, acting through its authorized agent and representative, Edgar Bronfman, so fully dominated and controlled the Riceland Corporation, plaintiff's predecessor, that it did not exist or operate as a separate corporate entity, and the Bronfmans exercised complete management and control over plaintiff and its wholly-owned subsidiary, Huntington Creek Corporation. The oral agreement which the Court finds existed was made between Edgar Bronfman and defendant, through M. R. Shaffer, an authorized representative and agent and officer of the Riceland Corporation, and was binding upon the Bronfman family, the Riceland Corporation and the two corporations succeeding in ownership to the corporate stock of the Riceland Corporation. The parties understood and agreed that such oral agreement would be and was binding on the Riceland Corporation.

4. The verbal agreement with defendant, vesting an option in him to purchase a total of thirty per cent of the outstanding common stock of the Riceland Corporation, and to give him a valid, written, enforceable option to that extent, was not a part of defendant's employment agreement, but was made in 1954 after defendant had accepted and commenced employment with said corporation; it was a separate and divisable oral contract and was supported by the executed consideration of services previously rendered and then being rendered by defendant to the Bronfman family and the Riceland Corporation, both being one and the same.

5. Under the verbal option agreement, defendant had a vested option to buy thirty per cent of the issued and outstanding common stock of the Riceland Corporation, exercisable at any time and as to all or any part of said thirty per cent, at a price of one dollar per share, and defendant was to receive a valid written and enforceable option to said extent.

6. On June 2nd and 6th, 1955, the Bronfmans and Riceland Corporation partially performed said previous oral agreement by delivering three letters, signed by an officer of the Riceland Corporation and an employee of the Bronfmans, duly authorized to so execute and deliver said letters, which constituted a valid and enforceable written option in defendant to purchase eight per cent of the total common corporate stock of the Riceland Corporation then issued and outstanding. Said instrument was accepted by defendant, who was then prepared, able and willing to execute said option, furnished in partial performance of the prior agreement, but exercise thereof was deferred at the request of the Bronfmans and the Riceland Corporation.

7. Defendant had a reasonable time within which to exercise his option, under all of the circumstances, and did exercise said option within a reasonable time, orally, on the

morning of January 22, 1957, and thereafter in writing, tendering the purchase price of one dollar per share by application on the amount then due him, by letters dated February 13, 1957, and June 14, 1957. The stock option agreement was breached by refusal to recognize his rights, and he had no obligation to make cash tender at the time of his discharge or any subsequent time, since such a tender would have been vain and useless, but he nevertheless did make such a tender by his letters aforesaid and in his amended counterclaim herein.

8. Defendant agreed to assign one-third of his stock, when obtained, to Mr. Hicks, but there was no [illegible]ion agreement or other agreement relative to the [illegible]ck between Hicks and the Bronfmans or their corporat[illegible]s.

9. Defendant fully performed his part of the option agre[illegible]nent to the date of his discharge, and was willing to cont[illegible]ue such performance, and the services so rendered were unique and highly successful, and constituted the basic and primary consideration for the stock option and for exercise thereof, the one dollar per share payable upon exercise thereof being a subordinate consideration which the Bronfmans and the Riceland Corporation declined to accept, although offered.

10. As of January 22, 1957, and thereafter, the Bronfmans and the Riceland Corporation breached a valid and binding stock option agreement with defendant and as of such time the value of said common stock was $3.27 per share. Exercise of said option by defendant bound the Bronfmans and the Riceland Corporation to transfer 25,450 shares of the then issued and outstanding aggregate of 84,834 shares, and after crediting one dollar per share thereon, defendant was entitled to common stock of an aggregate value of $57,771.50. Partial performance by the Riceland Corporation of said oral agreement occurred before plaintiff's subsidiary acquired the Bronfmans' stock

as of June 30, 1955, and it and plaintiff was aware of and were bound by the obligation of the Riceland Corporation and the Bronfman family to defendant. Plaintiff made performance of such contract impossible by it by dissolving the Riceland Corporation and defendant was entitled to counterclaim herein for the obligation so assumed by plaintiff in dissolution of the Riceland Corporation, and is entitled to judgment in the principal amount of $57,771.50 with interest thereon from January 22, 1957, at six per cent per annum until paid, such interest totalling $16,331.64 from said date to October 9, 1961. Applying the amount due plaintiff under defendant's promissory note to the interest payable to the defendant, leaves a balance of interest now payable to defendant of $8,198.36.

11. Although defendant's option rights were unconditional, at all times the wells drilled by the Riceland Corporation for the Frankfort Corporation were upon contracts awarded after competitive bids, and from 1956 onward, the Riceland Corporation drilled more wells for others than it drilled for the Frankfort Corporation.

12. The agreement with defendant for a stock option was not an agreement for the sale of stock but conferred rights upon him either to exercise said option or not, as he chose, and was a right evidenced, in part, by the letters of the Riceland Corporation delivered and accepted in June of 1955. Defendant received and accepted this evidence of his right, and had theretofore paid the purchase price for such right through his exceptional services.

13. The letter of June 6, 1955, from the Riceland Corporation to M. R. Shaffer constituted an attempted transfer of title to a corporate stock certificate recognized as owned by him, unaccompanied by delivery of the certificate, and was a written promise to transfer one per cent of the total issued stock then outstanding.

14. The verbal agreement for a stock option could have been exercised by defendant within, and was performable

by the Riceland Corporation within a year from the time it was made. Defendant became President of Riceland Corporation in July of 1954 and thereafter was employed and re-elected as President of said corporation from year to year.

15. The Bronfman family, acting through Edgar Bronfman, and Edgar Bronfman himself, never intended to perform or to fully perform the oral agreement or written option with defendant. The stock option transaction was tainted with fraud of Edgar Bronfman and he was guilty of fraud from the inception of the agreement which he made and was authorized to make. He intended to use the Oklahoma Statute of Frauds and the corporations involved to perpetrate fraud.

16. The actual value of the stock to which defendant was entitled was ascertainable as of January 22, 1957, and thereafter, and stipulated book value thereof did not completely reflect said actual value. The Court has twice requested the financial statements of the Riceland Corporation from plaintiff and has not been furnished with the same.

17. During 1955, M. R. Shaffer, as duly authorized agent and representative of the Bronfmans and the Riceland Corporation, prepared, signed and submitted a notegram or memorandum specifying a total common stock participation by defendant of thirty per cent of the issued and outstanding common stock of the Riceland Corporation, which, considered with the letters of June 1955 previously mentioned, constituted definite, complete, connected memoranda constituting an enforceable written stock option to the extent of thirty per cent of the issued and outstanding shares of common stock of the Riceland Corporation, the three letters of June, 1955, recognizing that defendant's "full" or "total" participation was greater than the eight per cent thereby extended to him.

18. It was immaterial to defendant ~~or to the parties~~ involved whether his stock option bound stock issued and outstanding at any one time, wholly or partly, or partly from authorized but unissued common stock of the Riceland Corporation, since if exercised and satisfied in whole or in part from unissued stock of said corporation, defendant would have been entitled to a larger number of shares of said stock, with a proportionately lower value per share, but with the same aggregate value as if transferred only from stock then issued and outstanding.

Conclusions of Law

1. Plaintiff is entitled to judgment for the balance due under defendant's promissory note in the amount of $8,133.28, to be applied as an offset against the interest due defendant on the principal amount of his judgment under his amended first counterclaim. No taxes are due the State of Oklahoma under the Intangible Tax Laws by reason of said promissory note.

2. Defendant is entitled to withdraw his amended second counterclaim and to have it dismissed without prejudice.

3. The stock option agreement with defendant was [illegible] is valid, binding and complete, exercisable in whole or in part at any time or within a year from the initial making thereof, constituted a valid and binding obligation of the Riceland Corporation, assumed by and known to plaintiff, and binding upon it, and the enforceability thereof is not barred by the Oklahoma Statute of Frauds, or any portion thereof, because of partial performance thereof by the Riceland Corporation, performance thereof by defendant, and sufficient written memoranda thereof.

4. Defendant is entitled to judgment against plaintiff under his amended first counterclaim for breach of contract to his monetary damage in the principal amount of $57,771.50, ascertainable as of January 22, 1957, with in-

terest thereon from said date at the rate of six per cent per annum, totalling $16,331.64 as of October 9, 1961, and thereafter until paid.

5. Costs herein are taxable against plaintiff.

STEPHEN S. CHANDLER,
Judge

Filed Nov. 21, 1961.

JUDGMENT

This action was tried by the Court without a jury on December 13, 1960, when plaintiff appeared by its attorneys, William A. Jansen of New York City, New York, T. Murray Robinson and Leon Shipp, of Oklahoma City, Oklahoma, and defendant appeared in person and by his attorneys, Houston Bus Hill and Loyd Benefield. The Court's findings are filed herewith, and the Clerk is directed to enter this Judgment. The Court finds generally all issues, express or implied, in favor of defendant under his amended first counterclaim and against plaintiff, and finds that defendant is entitled to withdraw his amended second counterclaim, which should be dismissed without prejudice.

It Is Hereby Ordered And Adjudged as follows:

1. Defendant has judgment against plaintiff under his amended first counterclaim in the amount of $57,771.50, principal, with interest thereon at the rate of six per cent per annum from January 22, 1957, until paid, which interest aggregates $16,331.64 as of October 9, 1961, against which total interest, as an offset reducing the same to a total of $8,198.36 as of October 9, 1961, plaintiff is entitled to the amount of its judgment under its complaint, herein rendered.

2. Plaintiff has judgment as an offset against the total interest due and payable to defendant upon his judgment,

in the sum of $8,133.28, which amount is fully paid as an offset against said interest on defendant's judgment.

3. Defendant's amended second counterclaim is dismissed without prejudice.

4. Costs herein are taxed against plaintiff, the taxable amount thereof to be hereafter inserted by the Clerk of this Court, being in the sum of $.....

Dated and directed to be entered this 21st day of November, 1961.

STEPHEN S. CHANDLER
Chief Judge of the United States District Court

Entered Nov. 21, 1961.

APPENDIX B

Opinion of the Court of Appeals, United States Court of Appeals for the Tenth Circuit

OPINION

(October 25, 1962)

T. Murray Robinson and William A. Jansen (Mathias F. Correa, Robinson, Robertson & Barnes, John W. Nields, and Cahill, Gordon, Reindel & Ohl were with them on the brief) for Appellant.

John A. Johnson (Houston Bus Hill and Savage, Gibson, Benefield & Shelton were with him on the brief) for Appellee.

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

HILL, Circuit Judge.

This diversity action is here on appeal from a judgment rendered by the court below, sitting without a jury, in

favor of appellee, Dan W. Shaffer, on his counterclaim against appellant, Joseph E. Seagram & Sons, Inc., for breach of an alleged oral contract entitling him to purchase a certain amount of corporate stock.

Joseph E. Seagram & Sons, Inc., is the successor corporation to Riceland Corporation (hereafter referred to as Riceland). In 1954 the Bronfman family[1] of Montreal, Canada, owned 99% of the outstanding shares of common stock in Riceland.[2] The remaining 1% of issued stock was owned by M. R. Shaffer, a cousin of appellee, who was employed by the Bronfmans as a consultant on their investments in the oil and gas industry, and who was vice president of the Frankfort Oil Company (hereafter referred to as Frankfort), one of the many Bronfman family owned corporations.

At the beginning of 1954, Riceland was inactive, had practically no assets and had a large deficit on its books. At this time M. R. Shaffer was directed by the Bronfmans to determine the feasibility of reviving Riceland for the purpose of engaging in the business of drilling oil and gas wells. As a result, the Bronfmans decided to reactivate Riceland and asked M. R. Shaffer to find a suitable person to manage the revived corporation. To that end M. R. Shaffer contacted appellee early in 1954 and inquired if appellee was interested in the position with Riceland. Appellee was then employed as assistant drilling superintendent by a drilling company located in Tulsa, Oklahoma, but nevertheless indicated that he was interested in the job. His name was eltimately submitted to the Bronfmans with

[1] The Bronfman family was represented, in matters relevant to this case, by Edgar Bronfman, then a resident of Canada but now a resident of New York and the President of appellant corporation.

[2] Riceland was authorized by its charter to issue 150,000 shares of common stock but in 1954 only 79,699 shares had been issued. It also had issued some shares of preferred stock but these are not material to this case.

M. R. Shaffer's recommendation, in the form of a written memorandum dated February 22, 1954, that he be employed to take charge of Riceland's day to day drilling operations at a salary of $12,000 per year plus an expense account and automobile. M. R. Shaffer also stated in the memorandum:

> "Dan Shaffer [appellant] should acquire, and I would like to approve common stock holdings in Riceland."

Riceland was revived, appellee's employment was approved by the Bronfmans as recommended by M. R. Shaffer and he commenced work on April 16, 1954, taking charge of the drilling operations.

It is undisputed that some seven months after appellee's employment commenced, Riceland loaned him $10,000 to purchase a home.[3] It is also undisputed that the subject of allowing appellee to acquire common stock holdings in Riceland was discussed at the time he accepted the position with Riceland, but no agreement was reached at that time concerning the stock purchase.

M. R. Shaffer testified that in May, 1954, he informed appellee that a 30% stock option for him had been accepted and approved or agreed to by the Bronfmans. Appellee then replied that this was acceptable to him. In this respect, M. R. Shaffer further testified at the trial, that as a result of the reviving of Riceland he made a survey to determine an equitable participation in corporation stock between the financiers and operators of it; that he prepared and submitted a written memorandum or "notegram" to the Bronfmans wherein he recommended a 60-40

[3] Appellee's refusal to repay the balance due on loan was the basis of this action as originally instituted by appellant, and it recovered judgment in the sum of $8,133.28 plus interest against appellee on its complaint. This portion of the judgment below is not questioned here.

participation with the Bronfmans retaining 60% of the common stock, he, M. R. Shaffer, would increase his holdings from 1% to 10%, and appellee would have 30%; that prior to the time he advised appellee of the 30% stock purchase contract this memorandum was discussed with the Bronfmans, who acted favorably upon and agreed to his recommendations; and that he was authorized by them to contact appellee and see if the 30% was agreeable, which he did, and reported back to Edgar Bronfman that the deal was made with appellee on that basis. This memorandum was not produced at the trial, but, M. R. Shaffer was permitted, over objection, to testify about it. He also testified that there was no discussion about when the "option" was exercised and there was no discussion or agreement where the stock was going to come from, i.e., whether from outstanding stock or unissued stock. Nor was there anything in writing from either the Bronfmans or Riceland to appellee defining the terms of such alleged agreement. In this connection Edgar Bronfman testified he had never discussed a 30% stock participation plan for appellee with M. R. Shaffer, appellee, or anyone else and the figure of 30% was never mentioned until appellee asserted his claim for that amount in 1957.

On July 8, 1954, appellee officially became President and a director of Riceland. Almost a year later on April 6, 1955, and without any further action having been taken with regard to the alleged oral contract in question, Edgar Bronfman wrote to appellee advising him that his salary had been raised to $17,000 per year, retroactive to January 1, 1955, and stating:

> "Common stock participations by yourself and Mr. Hicks are under advisement and, when the details have been examined, I should like to discuss this with you."[4]

[4] It appears from the record that appellee had made a separate agreement with Hicks whereby he would relinquish 10% of his alleged 30% to Hicks as an inducement for Hick's employment.

On June 2, 1955, E. A. Bratton, an accountant for the Bronfmans and Vice President and Treasurer of Riceland wrote to appellee as follows:

"Dear Dan:

Re: Shareholding Interests.

"This will confirm the shareholding participations in the outstanding common stock of Riceland Corporation for yourself and Orville W. Hicks as follows:

Dan W. Shaffer	5%	4,242 shares
Orville W. Hicks	2%	1,696 "
Other Shareholders	93%	78,900 "
	100%	84,838 "

"The cost of the shares will be $1.00 a share, with terms of payment to be arranged.

"It is also understood that the 799 shares owned by Mr. M. R. Shaffer will form part of your common stock participation and that Mr. M. R. Shaffer will be reimbursed $799.00 representing his cost.

"A directors' meeting will be required to formally confirm your stock participation. I suggest, however, that this meeting be deferred for the time being."[5]

Appellee testified that he interpreted this letter as meaning the 5% to him and the 2% to Hicks represented a partial draw down against his 30% participation and that, upon receiving it, he immediately called M. R. Shaffer who suggested he telephone Bratton, which he did, informing Bratton of his interpretation and was advised by Bratton

[5] It is conceded in the record that no action was ever taken by Riceland's directors with respect to any stock option in favor of appellee, despite the existence of this and other correspondence hereafter discussed.

"to hold off on doing anything and he would be told later how the whole matter would be handled."[6]

Four days later and on June 6, 1955, Bratton wrote to M. R. Shaffer, as follows:

> "Dear Ray: With further reference to the shares of Riceland owned by you, it has been the understanding that they will be purchased by Dan Shaffer. I am told that this should be done immediately, even before Dan takes down the balance of his share option. The cost for your shares is $1.00 a share of $799.00 total.
>
> "Will you please undertake with Dan to transfer the shares as soon as you can?"[7]

On the same day, Bratton wrote to appellee, enclosing a copy of the letter to M. R. Shaffer, and stating:

> "Dear Dan: Attached is copy of letter to Ray in connection with the purchase by you of his 799 shares of Riceland.
>
> "There is one point, Dan -- if you wish to defer purchase until you get your full participation or for personal reasons you do not wish to take down the shares now, an alternative method would be for Riceland to redeem the shares; they would then be included in your total participation when issued later.
>
> "Whichever way you decide is satisfactory to the other directors, Dan, but you might let me know what you decide."[8]

---

[6] In this connection M. R. Shaffer testified about the letter as follows:

> "This would be a draw down of stock totaling 7 per cent, and would have to have been -- for authorized by the stockholders of Riceland."

[7] This transaction concededly never occurred.

[8] Edgar Bronfman testified that he "assumed" the three letters were discussed with him before they were written and did not deny he authorized Bratton to write them.

In late 1955, all of the outstanding stock of Riceland was sold to The Huntington Creek Corporation, one of appellant's wholly owned subsidiaries. This transfer was effective as of June 30, 1955, and the Huntington Creek corporate minutes reflect that 79,699 shares of Riceland's common stock, having a par value of $1.00 per share, were purchased by it for $.79 per share. Appellee testified M. R. Shaffer informed him that a decision had been made to satisfy his stock participation by some other means, namely, an option on appellant's stock for equal value since Riceland's stock had been sold to Huntington Creek but that this would be worked out with him.

Appellee further testified that in December, 1955, he was in New York City on Business for the company; that the subject of his stock participation was to be discussed but Edgar Bronfman was unable to attend this meeting so no such discussion was had; that he called Bronfman in Montreal from New York City and Bronfman requested the stock purchase discussion be deferred, but assured him the matter would be worked out later.

The record shows nothing further was done about the "option" for over a year until shortly before appellee was removed from his position as President and Director of Riceland on January 22, 1957. It is not disputed that on January 2, 1957, and, after appellee had learned of the probable termination of his employment, he submitted a written offer to purchase Riceland based upon an actual valuation of $3.27 a share for the stock and that his offer included the relinquishment of any consideration due on his stock participation plan. Appellee's offer was rejected and he then orally attempted to exercise his alleged 30% stock option at the time he was removed from office.

On February 13, 1957,[9] appellee wrote to Edgar Bronf-

[9] He apparently wrote an earlier letter on February 6, 1957, which was unintentionally unsigned and in which he stated that the "option" was a "substantial part of the inducement to me to assume the presidency of Riceland."

man asserting his alleged 30% stock option and requesting that shares of common stock of that amount be delivered to him. On February 15, 1957, Edgar Bronfman wrote to appellee denying that appellee had ever had a "stock option agreement" and stating that when Huntington Creek purchased Riceland's stock "I told you that any discussions we had had about a stock participation were obsolete, as the situation had radically altered." This is apparently a reference to the decline in Riceland's drilling operations in 1956 which ultimately led to appellee's dismissal from Riceland.

About four months later, Riceland demanded payment of the loan it had made to appellee, which was refused. Appellee then asserted that under the terms of his employment he was to have a stock participation of 30% of Riceland's common stock and he was willing to let the unpaid balance of the note apply against the stock settlement.

Thereafter, and as of July 31, 1957, Huntington Creek transferred all of Riceland's outstanding stock to appellant and Riceland was later dissolved. All of its assets were distributed to appellant.

Upon this and other evidence hereafter discussed, the trial court resolved all issues of fact and law in favor of appellee on his counterclaim and specifically found: An oral contract was made between appellee and Edgar Bronfman, through M. R. Shaffer, which was binding upon the Bronfmans, Riceland, Huntington Creek and appellant, under the terms of which an option to purchase 30% of the outstanding common stock of Riceland became vested in appellee and such agreement was made, not as a part of his employment agreement, but in 1954 after he had accepted and commenced such employment; appellee was to receive a valid written and enforceable option to buy 30% of such stock for $1.00 per share, exercisable at any time and as to all or any part of 30% of the stock; the oral contract was supported by executed consideration in the form

of services rendered and then being rendered to the Bronfmans and Riceland;[10] the stock option was evidenced by the unfound memorandum or "notegram" prepared by M. R. Shaffer and the letters signed by Riceland's officer and agent, Bratton, dated June 2 and 6, 1955; the delivery of such letters constituted partial performance by the Bronfman family and Riceland; appellee had a reasonable time within which to exercise such option and he did so within that time; at the time the oral contract was breached the value of the common stock was $3.27 per share; and appellee was entitled to a transfer of 25,450 shares of the then issued and outstanding aggregate of 84,834 shares. The court, after crediting $1.00 per share thereon, rendered judgment for appellee on the basis of common stock of an aggregate value of $57,771.50. Appellant perfected this appeal from that judgment, contending that the claimed oral agreement is invalid and unenforceable under the Oklahoma Statute of Frauds.[11]

The object of the statute of frauds is to prevent fraud and perjury in the enforcement of obligations, depending for their evidencing support on the unassisted memory of witnesses, by requiring certain designated contracts and

---

[10] The court found and held that the Bronfmans so dominated and controlled Riceland that it did not exist as a separate corporate entity.

[11] 15 Okl. St. Annot., § 136, provides in pertinent part as follows:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:
>
> 1. An agreement that, by its terms, is not to be performed within a year from the making thereof.
>
> • • • •
>
> 4. An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences or some of them, of such things in action, or pay at the same time some part of the purchase money; • • •."

transactions to be evidenced by a writing signed by the party to be charged and not for the purpose of promoting frauds or aiding an individual in the perpetration of a fraud. Wells v. Shriver, 81 Okl. 108, 197 Pac. 460; 37 C.J.S., Statute of Frauds, § 1, p. 513. It does not prohibit the making of such contracts but only affects and prohibits the enforcement thereof. Bond v. Chalfant, 201 Okl. 600, 208 P. 2d 535; Teel v. Harlan, 199 Okl. 268, 185 P. 2d 695.

In Oklahoma, the statute of frauds clearly applies to a contract for the purchase and sale of corporate stock. Farrell v. Simons, 180 Okl. 600, 71 P. 2d 688; Dennison v. Hildt, 180 Okl. 399, 70 P. 2d 56, 112 A.L.R. 486. Such a contract is, therefore, invalid and unenforceable under subsection 4 of § 136 unless one of the following requirements is met: (1) "the buyer accept or receive part of such goods and chattels, or the evidences or some of them, of such things in action"; or (2) "the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent"; or (3) the buyer "pay at the same time some part of the purchase money."

There is no question presented here with respect to the first requirement since the appellee, as the buyer under the alleged oral agreement or "option" clearly did not receive or accept any part of the corporate stock, or any evidence thereof, alleged to be covered by such agreement. The court below did, however, find that the material terms of the claimed oral agreement were reflected in the written memorandum or "notegram" prepared by M. R. Shaffer and submitted to the Bronfmans and the three letters written by Bratton in June, 1955,[12] and that, in any event, the claimed oral agreement was partly performed by both par-

[12] Finding No. 17 reads as follows:

"During 1955, M. R. Shaffer, as duly authorized agent and representative of the Bronfmans and the Riceland Corporation, prepared, signed and submitted a notegram or memorandum specifying a total common stock participation by

ties.[13] The court then concluded that the enforceability of the claimed oral agreement was not barred by the Oklahoma Statute of Frauds.

"The well-established rule is that a complete contract, whether it relates to a sale of real estate or a sale of goods, which is binding under the statute of frauds may be entered into by one or more letters, telegrams or other writings between the parties relative to the subject matter of the contract if they are so connected with each other that they may be fairly said to constitute one paper relating to

---

defendant of thirty per cent of the issued and outstanding common stock of the Riceland Corporation, which, considered with the letters of June 1955 previously mentioned, constituted definite, complete, connected memoranda constituting an enforceable written stock option to the extent of thirty per cent of the issued and outstanding shares of common stock of the Riceland Corporation, the three letters of June, 1955, recognizing that defendant's 'full' or 'total' participation was greater than the eight per cent thereby extended to him."

[13] Findings Nos. 6 and 9 read as follows:

"On June 2nd and 6th, 1955, the Bronfmans and Riceland Corporation partially performed said previous oral agreement by delivering three letters, signed by an officer of the Riceland Corporation and an employee of the Bronfmans, duly authorized to so execute and deliver said letters, which constituted a valid and enforceable written option in defendant to purchase eight per cent of the total common corporate stock of the Riceland Corporation then issued and outstanding. Said instrument was accepted by defendant, who was then prepared, able and willing to execute said option, furnished in partial performance of the prior agreement, but exercise thereof was deferred at the request of the Bronfmans and the Riceland Corporation."

"Defendant fully performed his part of the option agreement to the date of his discharge, and was willing to continue such performance, and the services so rendered were unique and highly successful, and constituted the basic and primary consideration for the stock option and for exercise thereof, the one dollar per share payable upon exercise thereof being a subordinate consideration which the Bronfmans and the Riceland Corporation declined to accept, although offered."

the contract. However, in order to be sufficient the writings relied upon must by reference to each other disclose every material part of a valid contract and must be signed by the party sought to be charged or by his agent. The memoranda or writings must plainly set forth the parties to the contract, the subject matter thereof, the price or consideration, a description of the property, and all of the terms and conditions of the contract, and must leave nothing to rest in parol. Irvine v. Hamotis, 208 Okl. 1, 252 P. 2d 470; Hawkins v. Wright, 204 Okl. 55, 226 P. 2d 957; Jennings v. New York Petroleum Royalty Corp., 169 Okl. 528, 43 P. 2d 762; Mason Motors Spirit Distributing Co. v. Cosden, 105 Okl. 244, 231 Pac. 890; Atwood v. Rose, 32 Okl. 355, 122 Pac. 929; Halsell v. Renfrow, 14 Okl. 674, 78 Pac. 118, aff'd 202 U.S. 287. Parol evidence cannot be permitted to supply an omission of any essential element of the contract. Halsell v. Renfrow, supra. The design of the statute is to have written evidence of the terms thereof and any missing link which requires resort to oral evidence to connect or establish the agreement is fatal. Dennison v. Hildt, supra. And there must be no substantial inconsistency between a signed document and another document incorporated in it by reference or relied upon to establish any of the material terms of the contract. 37 C.J.S. Statute of Frauds, § 178, p. 661.

The memoranda or writings required by the statute must show an existing and binding contract, a concluded agreement, a meeting of the minds of the parties as distinguished from mere negotiations. It is an incomplete contract where the parties have left an essential part of the agreement for future determination. Farrell v. Simons, supra; Griffin Grocery Co. v. Kingfisher Mill & E. Co., 168 Okl. 157, 32 P. 2d 63; American Natl. Bank v. Ardmoreite Pub. Co., 123 Okl. 225, 253 Pac. 81, 37 C.J.S., Statute of Frauds, § 180, p. 663. If the memoranda or writings are afterwards lost or destroyed, the contents thereof may be proved by oral testimony after a proper foundation has been laid. 49 Am.

Jur., Statute of Frauds, § 315, p. 630; 2 Corbin on Contracts, § 529, p. 790.

The question of whether the memoranda, letters or other writings relied upon are sufficient to constitute a contract or agreement which meets the requirements of the statute is one for the court to determine as a matter of law. Atwood v. Rose, supra; American Jobbing Ass'n v. James, 24 Okl. 460, 103 Pac. 670; 49 Am. Jur., Statute of Frauds, § 321, p. 636. Cf. Bell v. Ralston Purina Company, 10 Cir., 257 F. 2d 31. We must, therefore, determine as a matter of law whether the writings relied upon in this case, when measured by the standards of the foregoing rules, are sufficient to constitute a complete and binding agreement such as will satisfy the requirements of the statute of frauds.

It is readily apparent from an examination of the testimony regarding the unfound memorandum and a reading of the three letters that no one of them alone is sufficient to establish a binding contract under the statute. It is equally apparent to us that the unfound memorandum and the three letters when considered together are insufficient to constitute an existing and binding agreement such as will meet the requirements of the statute. Not only do the four documents fail to set forth all of the terms of the alleged agreement, such as the number of shares, whether such shares are to come from outstanding or unissued capital stock and the terms of payment, but they are actually inconsistent with each other. According to the evidence viewed in the light most favorable to appellee, the only thing agreed upon at the time he was employed is that he was to receive a "substantial stock option." It cannot be concluded that this is a completed contract and, indeed, no such contention is made. Appellee does contend as the trial court found that the unfound memorandum prepared by M. R. Shaffer establishes that he was to receive a 30% stock option and that this memorandum together with the three letters is sufficient. We do not agree for at least two reasons. First, the unfound memorandum is nothing more

than the recommendations of an agent to his principal and is not a writing between the parties, that is, it is not a writing between appellee and Riceland or the Bronfmans, and considered together with the three letters fails to show a meeting of the minds or a completed agreement. In order to so find, it is necessary to rely upon the oral testimony of M. R. Shaffer, which is exactly what the statute of frauds seeks to avoid. Second, the unfound memorandum is actually inconsistent with the later letters in that nowhere in the letters is a figure of 30% mentioned, but to the contrary, a figure of 5% plus 2% is mentioned. Moreover, even as late as January 1, 1955, after the preparation of the purported memorandum, there was no agreement between the parties. The most that can be said of these writings is that they tend to show negotiations between the parties were being carried on for appellee to acquire common stock holdings in Riceland if a suitable agreement could be reached.

We conclude that even when considered together the four documents are not sufficient to establish an existing and binding agreement such as is required to satisfy the statute of frauds. To hold otherwise would frustrate the purpose of the statute.

There remains to be considered the question of part performance as found by the trial court. In this connection, appellee contended in the court below and the court found[11]

[11] Finding No. 4 reads as follows:

"The verbal agreement with defendant, vesting an option in him to purchase a total of thirty per cent of the outstanding common stock of the Riceland Corporation, and to give him a valid written, enforceable option to that extent, was not a part of defendant's employment agreement, but was made in 1954 after defendant had accepted and commenced employment with said corporation; it was a separate and divisible oral contract and was supported by the executed consideration of services previously rendered an then being rendered by defendant to the Bronfman family and the Riceland Corporation, both being one and the same."

that the alleged oral agreement vesting a 30% stock option in appellee was not a part of his employment agreement but was made after he had accepted and commenced such employment and that it was a separate and divisible oral contract. In short, appellee's position was and is that there were two separate and distinct agreements between the parties, i.e., the employment agreement and the alleged oral agreement vesting a 30% stock option in him. That being the case, the performance of services under the employment agreement did not constitute a part performance of the alleged "option" agreement. In fact, the record conclusively establishes that the only consideration mentioned as to the alleged stock option was $1.00 per share. No part of such consideration was paid or tendered at any time and, therefore, there has been no part performance of the alleged agreement to take it out of the prohibition of the statute of frauds.

One other error urged by appellant that deserves our consideration is the specific finding of fraud on the part of Edgar Bronfman. Appellee did not plead fraud nor does the record show any mention of it until the trial judge, in his oral findings from the bench at the conclusion of the trial, injected it into the case. The pinning of the badge of fraud upon a person is a matter of serious concern and we fully appreciate appellant's desire to have this stigma removed. There is not a word of evidence in the case to justify such a finding. It was error for the trial judge to make such a finding.[15]

[15] The finding is as follows:

> "The Bronfman family, acting through Edgar Bronfman, and Edgar Bronfman himself, never intended to perform or to fully perform the oral agreement or written option with defendant. The stock option transaction was tainted with fraud of Edgar Bronfman and he was guilty of fraud from the inception of the agreement which he made and was authorized to make. He intended to use the Oklahoma Statute of Frauds and the corporations involved to perpetrate fraud."

Other contentions are presented by the parties which we need not consider in view of our disposition of the case.

The judgment is reversed, and the case is remanded with directions to enter judgment in favor of appellant upon appellee's counterclaim.

APPENDIX C

Order of Circuit Court Denying Rehearing

ORDER DENYING PETITION FOR REHEARING

Twenty-third Day, November Term,
Monday, December 10th, 1962.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX D

Oklahoma Statute of Frauds

15 Okl. St. Ann. § 136. STATUTE OF FRAUDS

The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that, by its terms, is not to be performed within the year from the making thereof.

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences or some of them, of such things in action, or pay at the same time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price and the names of the purchaser and person on whose account the sale was made, is a sufficient memorandum.

APPENDIX E

Article III of the United States Constitution

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, * * *

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising * * * between Citizens of different States, * * *

"* * * In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. * * *"

Amendment V To The United States Constitution

"No person shall * * * be deprived of life, liberty, or property, without due pricess of law; * * *"

APPENDIX F

Rules 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A.

"Rule 52. Findings by the Court

"(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

See also Amendments to Rules of Civil Procedure for the United States District Courts adopted by the Supreme Court of the United States, January 21, 1963, 31 F.R.D. 1 at page 17.

APPENDIX G

Rule 19 of the Revised Rules of the Supreme Court of the United States Adopted April 12, 1954 Effective July 1, 1954

"PART V. JURISDICTION ON WRIT OF CERTIORARI.

19.

"CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

* * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state

or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . . "

APPENDIX H

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1962

DAN W. SHAFFER, *Petitioner*,

v.

JOSEPH E. SEAGRAM & SONS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11, 1963.

(S) BYRON R. WHITE
Associate Justice of the Supreme Court of the United States.

Dated this 8th day of March, 1963.

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FILED
MAY 13 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1013.

DAN W. SHAFFER,

Petitioner,

v.

JOSEPH E. SEAGRAM & SONS, INC.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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May 10, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1013

DAN W. SHAFFER,

Petitioner,

v.

JOSEPH E. SEAGRAM & SONS, INC.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Respondent respectfully submits that the petition for a writ of certiorari in this case should be denied for the reasons hereinafter set forth.

Opinions Below.

The United States District Court for the Western District of Oklahoma entered judgment in favor of respondent on its complaint (R. 1-3), and in favor of petitioner on his amended counterclaim (R. 5-9), without opinion. The findings of fact and conclusions of law of that court (R. 10-15) are not reported but are annexed to the petition as Appendix A.

Upon appeal by respondent to the United States Court of Appeals for the Tenth Circuit, judgment on the counter-

claim was reversed and directed to be entered in favor of respondent. The opinion of the Court of Appeals, entered October 25, 1962, is reported at 310 F. 2d 668 and is annexed to the petition as Appendix B. A petition for rehearing was denied December 10, 1962 (App. 23a).

By order of Mr. Justice White, entered March 8, 1963, the time for filing of the petition was extended to and including April 11, 1963 (App. 26a).

Questions Presented.

(1) Did the Court of Appeals, in reversing the decision of the District Court, comply with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"?

(2) Did the Court of Appeals, in reversing the decision of the District Court, correctly apply the Oklahoma statute of frauds to the facts of the case?

Counter-Statement of the Case.

In 1954, the outstanding common stock of Riceland Corporation, a Delaware corporation ("Riceland"), was owned almost entirely by members of the Bronfman family, residents of Montreal, Canada (R. 159-61).* The balance of the outstanding common stock, 799 shares, was owned by M. R. Shaffer, a first cousin of petitioner Dan W. Shaffer, who was on retainer to the Bronfman family as an advisor on its investments in the oil and gas industry (R. 56; Exs. 3-5, R. 37, 38, 132-34).

---

*The Bronfman family also owns a controlling interest in the Canadian parent of respondent (R. 67, 160). The family was represented in matters relevant to this case by Edgar Bronfman, then a resident of Montreal and now President of respondent and a resident of New York (R. 157-58, 160).

At that time Riceland was largely inactive, and had almost no assets other than a tax loss carryover in an amount in excess of $200,000 (R. 58, 161). The Bronfman family had undertaken to revive it and to reengage it in the business of drilling oil and gas wells under contract to other companies (R. 59-60).

M. R. Shaffer was directed by the family to recruit someone to take charge of these operations (R. 60). In this connection, he approached petitioner (R. 62). The latter indicated his interest (R. 87), and his name was thereupon submitted for consideration by the Bronfman family (Ex. 1, R. 37, 38, 130-31). Petitioner was approved by the family and was employed by Riceland commencing April 16, 1954, at a salary of $12,000 plus an expense account and an automobile (R. 23, 29, 87). In addition, Riceland loaned petitioner $10,000 to enable him to purchase a home (R. 30).

On July 8, 1954, petitioner was elected President and a director of Riceland (Exs. 18, 18A, R. 94, 143-44).

The District Court found that, after petitioner had begun his employment, the parties made a separate oral agreement to give petitioner an option to buy 30% of the Riceland common stock at $1 per share (Findings Nos. 4, 5, R. 11, App. 2a).

M. R. Shaffer testified that the figure of 30% was recorded in a memorandum submitted by him to the Bronfman family in late April or May, 1954* (R. 66, 81). This memorandum was not produced at the trial and has never been found by either of the parties.

The record shows the following about that memorandum:

---

* The reference in Finding No. 17 (R. 14, App. 4a-5a) to the date of submission of the memorandum as 1955 is apparently a typographical error (cf. R. 81).

(1) It was at most only a recommendation to the Bronfman family by M. R. Shaffer, as he himself stated (R. 66, 81);

(2) M. R. Shaffer also testified that the memorandum not only recommended a stock participation for petitioner but also advocated a 10% participation for M. R. Shaffer himself (*ibid.*). The record shows that M. R. Shaffer never received any participation as a result of this recommendation (R. 70-71, 82);

(3) Although the District Court found that the memorandum had been signed by M. R. Shaffer (Finding No. 17, R. 14, App. 5a), there is no support whatsoever for this in the record.

A year later, on April 6, 1955, Edgar Bronfman wrote petitioner that his salary was to be raised to $17,000 per annum, retroactive to January 1, 1955 (Ex. 2, R. 37, 38, 131). That letter went on to state:

> "Common stock participations by yourself and Mr. Hicks [Riceland's Vice President and drilling superintendent] are under advisement and, when the details have been examined, I should like to discuss this with you." (R. 132)

This of course is utterly inconsistent with the contentions of petitioner and the finding of the District Court that a 30% stock option had already been agreed upon. Yet this is in writing and is in evidence as a writing; the unfound memorandum is not.

Not only is this letter inconsistent with petitioner's claims and the finding of the District Court, but so are the three other writings which were put in evidence and relied upon, and which are hereinafter set forth in full:

(1) On June 2, 1955, E. A. Bratton, an accountant for the Bronfman family and a Vice President of Riceland

(R. 67, 165; Ex. 18-A, R. 94, 144), wrote to petitioner as follows:

> "Dear Dan: Re: Shareholding Interests. This will confirm the shareholding participations in the outstanding common stock of Riceland Corporation for yourself and Orville W. Hicks as follows:
>
> | | | |
> |---|---|---|
> | Dan W. Shaffer..... | 5% | 4,242 shares |
> | Orville W. Hicks..... | 2% | 1,696 " |
> | Other Shareholders ..... | 93% | 78,900 " |
> | | 100% | 84,838 " |
>
> "The cost of the shares will be $1.00 a share, with terms of payment to be arranged.
>
> "It is also understood that the 799 shares owned by Mr. M. R. Shaffer will form part of your common stock participation and that Mr. M. R. Shaffer will be reimbursed $799.00 representing his cost.
>
> "A directors' meeting will be required to formally confirm your stock participation. I suggest, however, that this meeting be deferred for the time being." (Ex. 3, R. 37, 38, 132)

It is conceded in the record (R. 49) that no directors' action was ever taken with respect to any stock option in favor of petitioner, in spite of this letter and in spite of the requirements of the Delaware Corporation Law that a stock option can only be granted by action of the Board of Directors (8 Del. Code §157).

(2) Several days later, on June 6, 1955, Bratton wrote to M. R. Shaffer instructing him to sell the 799 shares to petitioner, as follows:

> "Dear Ray: With further reference to the shares of Riceland owned by you, it has been the understanding that they will be purchased by Dan Shaffer. I am told that this should be done immediately, even before Dan takes down the balance of his share

option. The cost for your shares is $1.00 a share or $799.00 total.

"Will you please undertake with Dan to transfer the shares as soon as you can?" (Ex. 4, R. 37, 38, 133)

This transaction concededly never occurred (R. 82, 112).

(3) Simultaneously, Bratton wrote to petitioner, enclosing a copy of his letter to M. R. Shaffer and stating as follows:

"Dear Dan: Attached is copy of letter to Ray in connection with the purchase by you of his 799 shares of Riceland.

"There is one point, Dan—if you wish to defer purchase until you get your full participation or for personal reasons you do not wish to take down the shares now, an alternative method would be for Riceland to redeem the shares; they would then be included in your total participation when issued later.

"Whichever way you decide is satisfactory to the other directors, Dan, but you might let me know what you decide." (Ex. 5, R. 38, 133-34)

Whether these writings are taken separately or taken together, they are entirely insufficient to satisfy the Oklahoma statute of frauds, 15 Okla. Stat. Ann. §136(4), and the Court of Appeals so held as a matter of law (App. 18a-21a).

In late 1955, effective as of June 30, 1955, all the outstanding stock of Riceland was sold to The Huntington Creek Corporation, a Pennsylvania corporation ("Huntington Creek") wholly-owned by respondent (Ex. 21, R. 122, 155-56). At that time Riceland still had a deficit position; its common stock, $1 par value, was sold for 79¢ per share (*ibid.*).

On September 26, 1956, petitioner executed a promissory note to Riceland in the principal amount of $10,000 in consideration of the loan previously made (R. 2, 30). This

is the note upon which, less a credit hereinafter described, the complaint was based (R. 1-2).

Sometime in 1956 an independent management consultant had been retained by respondent to survey Riceland's operations (R. 170-71, 173). After an investigation, he reported to respondent's management that he was dissatisfied with petitioner's conduct of those operations (R. 173-74). Steps were thereupon taken to remove petitioner from office as President of Riceland.

On January 22, 1957, Huntington Creek, which was then the sole stockholder of Riceland, removed petitioner from the Riceland Board of Directors (Ex. 21, R. 122, 150). On the same day petitioner was then removed as President of Riceland by a majority of the remaining directors, who did so "because of his lack of ability properly to perform the duties of such office" (Ex. 21, R. 122, 152). Petitioner was granted one month's severance pay, in the amount of $1,416.67 (R. 3); this and earlier salary deductions, aggregating $450.05, were credited against the principal amount of the note (*ibid.*).

Petitioner testified (R. 107) that on the day he was removed from office he raised the matter of his alleged stock option with a representative of respondent, and on February 13, 1957, he wrote Edgar Bronfman as follows*:

> "Dear Edgar: I wish to take this opportunity to congratulate you on your recent promotion to the presidency of Joseph E. Seagram & Sons. I know that this gives you and yours a great deal of personal satisfaction.
>
> "Edgar, as you know, I have been asked to resign as President and Director of the Riceland Corpora-

* The similar letter dated February 6, 1957 (Ex. 11, R. 41, 139) was apparently only a preliminary draft of the later letter (cf. Ex. 14, R. 41, 141).

> tion. Therefore, I feel that it is time for Riceland Corporation to deliver on my 30% common stock participation in the company. As you know, I have promised 10% of this participation to Orville Hicks, Vice, President and Director of Riceland Corporation.
>
> "Accordingly, at this time I will appreciate it very much if you will let me have a letter from you as soon as possible advising that you are making the necessary arrangements for Riceland to perform under my stock option agreement." (Ex. 13, R. 41, 140-41)

On February 15, 1957, Edgar Bronfman responded, saying in part:

> "Dear Dan: I see where you have chosen to make certain demands on this corporation, which I assume are based on certain general discussions we had when Riceland Corporation was owned by various members of the Bronfman family.
>
> "Let me correct your convenient memory. The figures you mentioned are absurd. No such nonsense was ever considered. Secondly, you now do not have, nor did you ever have a stock option agreement.
>
> "Furthermore, when Joseph E. Seagram & Sons, Inc. (represented by a subsidiary) purchased the shares of Riceland Corporation, I told you that any discussions we had had about a stock participation were obsolete, as the situation had radically altered." (Ex. 15-A, R. 42, 141-42)

Although Mr. Bronfman did not appear as a witness at the trial of this case, the record of his pretrial deposition was included in the record (R. 123-24, 157-75). In his deposition, Mr. Bronfman freely conceded that a stock option had been under consideration, but stated that the grant of

any stock option to petitioner was subject to two conditions precedent:

> (1) Riceland had to overcome its deficit surplus position;
>
> (2) Riceland had to stop drilling wells exclusively for Frankfort Oil Company, a division of a subsidiary of respondent whose General Manager was petitioner's cousin M. R. Shaffer, and obtain contracts from other companies (R. 158-59).

Petitioner completely failed to comply with these conditions, at least through 1955 when Riceland was sold to Huntington Creek (R. 158-59; cf. Finding No. 11, R. 13, App. 4a).

On June 7, 1957, Riceland demanded payment of the note (R. 3), which was refused by petitioner on the basis of the alleged stock option (Ex. 17, R. 45, 142-43).

As of July 31, 1957, all the outstanding stock of Riceland was transferred from Huntington Creek to respondent (Ex. 21, R. 122, 155-56). Thereafter, Riceland was dissolved and all of its assets were distributed to respondent (R. 19-20).

Although the alleged stock option is claimed to have been entered into in the spring of 1954 (R. 66, 81), and although petitioner's claim to any stock option is categorically denied in the foregoing letter of February 15, 1957, petitioner sought to assert his alleged claim to a stock option only by way of a counterclaim in the action against him on the note (R. 5-7).* This action was insti-

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* Petitioner's second counterclaim, for his salary as President of Riceland during the period from his removal from office through the dissolution of Riceland, was dismissed without prejudice (R. 16).

tuted on March 5, 1958 (R. 2), over a year after the aforesaid letter from Mr. Bronfman denying any stock option.

The District Court held that petitioner had entered into a binding stock option agreement with respondent (Findings Nos. 3-5, R. 11, App. 1a-2a; Conclusion No. 3, R. 15, App. 3a), that the unfound memorandum of April, 1954 and the three letters of June, 1955 constitute "definite, complete, connected memoranda" (Finding No. 17, R. 14, App. 5a) sufficient to satisfy the Oklahoma statute of frauds (Conclusion No. 3, R. 15, App. 6a), and that in any event petitioner's services to Riceland had constituted a part performance in satisfaction of the statute (*ibid.*).

The District Court also gratuitously found that the stock option transaction was "tainted with fraud of Edgar Bronfman and he was guilty of fraud from the inception of the agreement" and had "intended to use the Oklahoma Statute of Frauds and the corporations involved to perpetrate fraud" (Finding No. 15, R. 14, App. 5a).

The remarks of the District Court immediately after the trial below, reflecting its unsupported observations with respect to fraud, as well as other things, are set forth in the record (R. 124-29).

The Court of Appeals reversed. It held that the four documents were insufficient to satisfy the statute as a matter of law. Petitioner does not seek review of this basic aspect of the decision of the Court of Appeals.

The Court of Appeals also rejected the District Court's conclusion (Findings Nos. 4, 9, R. 11, 12, App. 2a, 3a; Conclusion No. 3, R. 15, App. 6a) that the statute had been satisfied by the services rendered to Riceland by petitioner. The Court of Appeals concluded that those services were performed under petitioner's employment agreement and did not constitute a part performance of or consideration for the alleged option agreement (App. 22a).

It is this aspect of the decision of the Court of Appeals to which the petition for a writ of certiorari is primarily directed, reliance being placed upon the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. In this connection it should be noted that the provisions of Rule 52(a) were specifically called to the attention of the Court of Appeals in petitioner's petition for rehearing addressed to that court. The petition was denied.

The Court of Appeals also held that it was error for the trial judge to make the finding of fraud on the part of Edgar Bronfman, on the ground that petitioner "did not plead fraud nor does the record show any mention of it until the trial judge, in his oral findings from the bench at the conclusion of the trial, injected it into the case", and that "There is not a word of evidence in the case to justify such a finding" (App. 22a). Petitioner does not seek review of this aspect of the decision of the Court of Appeals.

The Writ Should Be Denied.

This case is a private litigation involving the application of the Oklahoma statute of frauds to particular facts. It presents no question under federal law other than whether the Court of Appeals paid proper heed to the provisions of Rule 52(a). As will be pointed out below, the Court of Appeals' disposition of the case is fully in accord with the decisions of this Court with respect to Rule 52(a) and the Court of Appeals properly applied the Oklahoma statute of frauds.

Such of the petition as is directed to the practices and policies of this Court with respect to the granting of certiorari in diversity cases amounts to nothing more than an

effort to have this Court grant certiorari where there are no grounds for the granting.*

I.

The Court of Appeals Fully Complied with the Provisions of Rule 52(a) of the Federal Rules.

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, this Court set forth the meaning of Rule 52(a) as follows:

> "In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit*, errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the

* In this connection, it may be noted that as early as 1922 Mr. Chief Justice Taft had the following to say with respect to the function of this Court:

> "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal." Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 10479, 67th Cong., 2d Sess. 2 (1922).

> opportunity of the trial court to judge of the credibility of the 'witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U. S. at 394-95. Footnotes omitted.)

In the instant case it is abundantly clear from the opinion of the Court of Appeals that "the reviewing court on the entire evidence [was] left with the definite and firm conviction that a mistake [had] been committed" by the District Court. Indeed, it is clear that the Court of Appeals was left with the definite and firm conviction that many mistakes had been committed by the District Court.

Contrary to the decision of the District Court, the Court of Appeals held that as a matter of law the documentary evidence involved was not sufficient to establish an existing and binding agreement such as is required to satisfy the Oklahoma statute of frauds, stating that "To hold otherwise would frustrate the purpose of the statute." (App. 21a). Petitioner does not even seek to review this basic aspect of the decision of the Court of Appeals.

As noted above, the Court of Appeals also decided that it was error for the trial judge to make the finding of fraud because, as noted above, petitioner "did not plead fraud nor does the record show any mention of it until the trial judge, in his oral findings from the bench at the conclusion of the trial, injected it into the case", and that "There is not a word of evidence in the case to justify such a finding" (App. 22a). Here petitioner expressly states in his petition (Pet. 26) that he is in agreement with the determination of the Court of Appeals.

Before disposing of the finding of fraud, the Court of Appeals had the following to say with reference to the alleged part performance of the stock option agreement:

> "There remains to be considered the question of part performance as found by the trial court. In this connection, appellee contended in the court below and the court found[14] that the alleged oral agreement vesting a 30% stock option in appellee was not a part of his employment agreement but was made after he had accepted and commenced such employment and that it was a separate and divisible oral contract. In short, appellee's position was and is that there were two separate and distinct agreements between the parties, i. e., the employment agreement and the alleged oral agreement vesting a 30% stock option

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"[14] Finding No. 4 reads as follows:

"'The verbal agreement with defendant, vesting an option in him to purchase a total of thirty per cent of the outstanding common stock of the Riceland Corporation, and to give him a valid written, enforceable option to that extent, was not a part of defendant's employment agreement, but was made in 1954 after defendant had accepted and commenced employment with said corporation; it was a separate and divisible oral contract and was supported by the executed consideration of services previously rendered and then being rendered by defendant to the Bronfman family and the Riceland Corporation, both being one and the same.'

> in him. That being the case, the performance of services under the employment agreement did not constitute a part performance of the alleged 'option' agreement. In fact, the record conclusively establishes that the only consideration mentioned as to the alleged stock option was $1.00 per share. No part of such consideration was paid or tendered at any time and, therefore, there has been no part performance of the alleged agreement to take it out of the prohibition of the statute of frauds." (App. 21a-22a)

Thus, the Court of Appeals clearly disclosed its definite and firm conviction that the District Court was wrong, disagreeing with the second half of Finding No. 4 (R. 11, App. 2a), Finding No. 9 (R. 12, App. 3a), and Conclusion of Law No. 3 (R. 15, App. 6a). It would be hard to find stronger language than that used by the Court of Appeals when it said, "In fact, the record conclusively establishes that the only consideration mentioned as to the alleged stock option was $1.00 per share." (App. 22a)

That the Court of Appeals considered its action to be in compliance with Rule 52(a) is also shown by the fact that the petition for rehearing, specifically addressed to Rule 52(a), was denied by the Court of Appeals.

While the Court of Appeals was clearly entitled to disagree with the District Court on a matter of fact, it should also be noted that the conclusion of the Court of Appeals is in full accord with the applicable law on the subject of the statute of frauds and part performance.

> "The third generally stated requirement is that part performance will not make an oral contract enforceable unless it is such as to be directly 'referable' to that contract. There is so much variation in the ordinary wordings of this requirement that it cannot be reduced to any very definite form; it must be explained rather than stated. * * *

> "It is believed that the principal idea that is struggling for expression is that the part performance must be clearly evidential of the existence of a contract—it must be such as would not ordinarily have taken place in the absence of a contract and therefore is not reasonably explicable on some other ground." (2 Corbin, *Contracts* §430, [1950]*)

In the instant case where the petitioner contended below and the District Court found that the stock option agreement was not a part of defendant's employment agreement but was made after defendant had accepted and commenced employment, it is clear both as a matter of fact and of law that defendant's services were the discharge of his obligations under his employment contract and in no sense referable to the alleged stock option agreement. The part performance relied upon is in no way indicative of the existence of the alleged stock option agreement, as it is fully explicable on the ground of the employment contract.

II.

The Court of Appeals Properly Applied the Oklahoma Statute of Frauds.

The major portion of the opinion of the Court of Appeals is directed to an analysis of the writings relied upon and to the question of whether these writings are sufficient to satisfy the Oklahoma statute of frauds. Petitioner does not even seek a review of the determination

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* While this is found in the chapter entitled "Interests in Land-Effect of Part Performance of Oral Contract", Professor Corbin's discussion makes it clear that the same considerations apply to an oral contract for the sale of goods. E.g., 2 Corbin, *Contracts* §495 (1950). As is pointed out in Point II hereof, there is a question under the Oklahoma statute of frauds whether services can constitute part performance of a contract for the sale of goods.

of the Court of Appeals that these writings are not sufficient to satisfy the Oklahoma statute of frauds.

Petitioner's argument that his services should have been considered sufficient to make the alleged stock option agreement enforceable under the Oklahoma statute of frauds has not only been covered in Point I above, but is also based upon a misplaced reliance upon *Hays Drilling Co. v. Sartain*, 108 Okla. 181, 235 Pac. 615 (1925). Petitioner has misrepresented that decision. The *Hays* case involved an oral agreement for services in exchange for shares of stock having an aggregate par value of $1,000. After the services were rendered by plaintiff, defendant tendered the shares in accordance with the oral agreement. Plaintiff, however, refused the tender and sued for $1,495, claiming that the oral agreement was unenforceable under the statute of frauds. The sole basis of the decision of the Supreme Court of Oklahoma was that plaintiff could not perform his part of the contract according to its provisions, and then repudiate it and require defendant to perform in a manner other than provided. In the language quoted by petitioner (Pet. 22), the court was not discussing the statute of frauds at all but was merely pointing out that the facts before it were similar to those in earlier Oklahoma decisions where precisely the same claim had been rejected. It said in full:

> "There can be no question, but that the alleged oral agreement was not clothed with the sanctity of an enforceable contract, and that the plaintiff at his option, without suffering peril, could either carry it out or disregard it. But the question here is, since the plaintiff has fully carried out his part of the contract, can he repudiate the same and require the defendant to respond to him otherwise than as is provided by the alleged contract itself, when he pleads the same as the basis for his recovery in lien?

> In other words, the plaintiff has fully performed his part of what he pleads was a contract, the defendant has tendered full compliance, as it pleads, therewith. The performance by the plaintiff was in the nature of services fully rendered and benefits fully received by defendant, rather than money paid. We think the position of the plaintiff is, as a matter of law, the same as if he had paid to the defendant so much money for the stock, then decided to rue the bargain and bring suit for the recovery of the money, notwithstanding the fact that the defendant stood ready and willing to deliver that for which the money had been paid to it. Whatever may be the apparent holdings from other courts, we think the principle is settled in the case of Schechinger *v.* Gault, 35 Okl. 416, 130 P. 305, Ann. Cas. 1914D, 468." (235 Pac. at 616)

Thus, the *Hays* case does not stand for the proposition that services may constitute such performance as satisfies the Oklahoma statute of frauds with respect to a contract for the sale of goods.

The other cases relied upon by petitioner in support of this proposition arose in states other than Oklahoma and in states having the conventional statute of frauds language that a contract for the sale of goods may be enforced if something has been given in earnest to bind the contract or in part payment. 2 Corbin, *Contracts* § 467 (1950). The Oklahoma statute of frauds, on the other hand, only recognizes the payment of "some part of the purchase money" as sufficient performance to make a contract for the sale of goods enforceable.

However, the Court of Appeals did not reach the question whether services may constitute such performance as to make a contract for the sale of goods enforceable under Oklahoma law, because of its conclusion that the services involved were rendered under the employment agreement

and did not constitute a part performance of the alleged option agreement.

Conclusion.

For the reasons stated, the writ should be denied.

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May 10, 1963